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No. 91-545

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.

THE BLACKFEET TRIBE OF THE
BLACKFEET RESERVATION, et al.,
Respondents.

Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Indian tribes may tax the activities of non-members on trust lands within the reservation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS TO DENY THE WRIT	4
I. The Clear Decisions of This Court Support the Decision Below	4
A. The Court's Precedents in Three Major Cases in the Last Eleven Years Uphold Tribal Authority to Tax Nonmember Activity on Trust Lands, the Issue Involved Here	4
B. No Confusion or Conflict Exists in the Area of Tribal Authority to Tax Nonmember Activity on Trust Lands	7
C. A Consensual Relationship is Not Required to Tax Nonmember Activity on Trust Lands	12
II. Neither the Ninth Circuit's Decision Nor the Court's Precedents Authorize Unrestricted or Discriminatory Taxes	15
A. The Tribe's Taxing Authority is Subject to Federal Restrictions	15
B. The Use of Tax Revenues is Restricted to Providing Services	18
CONCLUSION	19
APPENDIX A	

TABLE OF AUTHORITIES

Page

CASES

<i>Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 492 U.S. 408 (1989).....	<i>passim</i>
<i>British American Oil Producing Co. v. Board of Equalization</i> , 299 U.S. 159 (1936).....	2
<i>Burlington Northern Railroad Co. v. Blackfeet Tribe</i> , 924 F.2d 899 (1991).....	3, 11, 13
<i>Burlington Northern Railroad v. Fort Peck Tribal Executive Board, et al.</i> , 701 F.Supp. 1493 (D. Mt. 1988).....	3, 4
<i>Commonwealth Edison v. Montana</i> , 453 U.S. 609 (1981).....	18
<i>Cotton Petroleum Corp. v. New Mexico</i> , 490 U.S. 163 (1989).....	6, 18
<i>Duro v. Reina</i> , 110 S.Ct. 2053 (1990).....	8, 10
<i>Kerr-McGee Corp. v. Navajo Tribe</i> , 471 U.S. 195 (1985).....	6, 16
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982).....	<i>passim</i>
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	<i>passim</i>
<i>Southland Royalty Co. v. Navajo Tribe</i> , 715 F.2d 486 (10th Cir. 1983).....	11
<i>United States v. Soldana</i> , 246 U.S. 530 (1918).....	7
<i>Washington v. Confederated Tribes of the Colville Indian Reservation</i> , 447 U.S. 134 (1980).....	4, 5, 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

Blackfeet Constitution, Article IV, § (1)(h)	15
Treaty of October 17, 1855, 11 Stat. 657	1
Act of April 15, 1874, 18 Stat. 28	2
Act of February 15, 1887, 24 Stat. 402.....	3
Act of May 1, 1888, 25 Stat. 113	2
Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. § 476	1, 15
1968 Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. § 1302.....	16
MONT. CODE ANN. § 15-6-141(1)(iv)	15
MONT. CODE ANN. § 15-6-145	15
MONT. CODE ANN. §§ 15-23-201-202	15
MONT. CODE ANN. §§ 15-23-301-303	15

MISCELLANEOUS

Executive Order of July 5, 1873, I Kappler 855	2
Executive Order of April 13, 1875, I Kappler 856	2
S.2281, 49th Cong. 1st Sess. (April 29, 1886)	13
H.R. 8741, 49th Cong. 1st Sess. (May 10, 1886).....	13
S.Rep. No. 1494, 49th Cong. 1st Sess. 6	13

STATEMENT OF THE CASE

In 1986, the Blackfeet Tribe ("Tribe")¹ enacted a possessory interest tax in order to "provide members and nonmembers of the Tribe residing, doing business or working on the Blackfeet Reservation with essential governmental services." Blackfeet Ordinance 80-A, Section 1 (December 30, 1986).² The tax is applicable to Burlington Northern Railroad Company ("BN") and to other taxpayers including utilities, oil and gas pipelines and oil and gas well-site improvements. The Tribe also has levied oil and gas production taxes since 1985 and applies a business licensing tax.

Under the possessory interest tax, the Tribe taxes BN's property located on its 58.18 mile right-of-way across trust lands of the Blackfeet Reservation. The Reservation is located in northwestern Montana and is bordered on the west by Glacier National Park and on the north by the United States - Canada border. The Tribe's original Reservation, as established by Treaty of October 17, 1855, 11 Stat. 657, included a much larger territory encompassing most of northern Montana east of the Rocky Mountains. The Reservation was gradually

¹ The Blackfeet Tribe is a federally recognized Indian tribe organized as a constitutional government under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 987, 25 U.S.C. § 476.

² Ordinance 80-A is reprinted in its entirety in the Appendix to this Brief. Section 1 is found at App. 1. Petitioner reprints only portions of the Ordinance in Petitioner's Appendix at 63a-67a.

reduced in size by various Executive Orders and Acts of Congress.³

By agreements with the United States in 1886 and 1887, the Blackfeet Tribe and other Montana Indian tribes who were residing on the Blackfeet Reservation agreed to again reduce the size of the Blackfeet Indian Reservation, and to establish separate reservations for the various tribes. The agreements were ratified by Congress on May 1, 1888, 25 Stat. 113 ("1888 Act"). In Article VIII of the 1887 Blackfeet agreement, the Blackfeet Tribe agreed to allow rights-of-way across its Reservation for railroads, highways and telegraph lines whenever the President determined it was in the public interest.

It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

25 Stat. 113, 115-16.

³ See Executive Order of July 5, 1873, 1 Kappler 855; Act of April 15, 1874, 18 Stat. 28; Executive Order of April 13, 1875, 1 Kappler 856. This history of the Reservation is described in *British American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159, 162-63 (1936).

In 1890, Burlington Northern's predecessor applied for a right-of-way across the Blackfeet Reservation pursuant to Article VIII of the 1888 Act. President Benjamin Harrison approved the right-of-way on October 14, 1890. And, as required by the Act, the specific terms and conditions of the right-of-way were set out in a letter from the Commissioner of Indian Affairs to the Secretary of the Interior dated October 20, 1890, and approved by the Secretary with amendment on October 24, 1890.⁴

BN initiated its present challenge to the Tribe's possessory interest tax in 1987.⁵ In the proceedings below, BN focused its argument on showing that the Tribe's beneficial title to the lands comprising the right-of-way was extinguished, i.e., the land was no longer trust land, and therefore no longer within the taxing jurisdiction of the Tribe. *Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899 (1991); *Burlington Northern Railroad v. Fort Peck Tribal Executive Board, et al.*, 701 F.Supp. 1493 (D. Mt. 1988). The District Court and the Ninth Circuit Court of Appeals rejected BN's argument that the 1888 Act

⁴ The Act of February 15, 1887, 24 Stat. 402, reprinted in Petitioner's Appendix at 51a-53a, granted a right-of-way to BN's predecessor terminating at "the Great Falls of the Missouri River", just southeast of the Blackfeet Reservation. BN's predecessor subsequently applied for and was granted a right-of-way across the Blackfeet Reservation in 1890 pursuant to Article VIII of the 1888 Act as described above. The 1887 Act therefore has no application to the Blackfeet Tribe or the reduced Blackfeet Reservation.

⁵ BN chose to bypass the tax protest procedures provided for in the Tribe's tax ordinance. App. at 9-12. The procedure provides for a hearing before the Blackfeet Tax Protest Panel, with the right of appeal to the Blackfeet Tribal Court and the Blackfeet Court of Appeals.

extinguished the Tribe's title. Both Courts upheld the Tribe's tax under this Court's clear decisions in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), that Indian tribes have the power to tax nonmember transactions on trust lands. In this Court, BN does not challenge the lower courts' holding that the lands involved are trust lands, even though, as the District Court noted, it conceded the power of the Tribe to tax transactions involving non-Indians that occur on trust lands. *Burlington Northern v. Fort Peck*, 701 F.Supp. at 1496. BN raises no substantial reasons why this Court should grant certiorari to review an issue which it conceded in the courts below, and which has been ruled on definitively by this Court at least three times in recent years.

REASONS TO DENY THE WRIT

- I. **The Clear Decisions of This Court Support the Decision Below.**
 - A. **The Court's Precedents in Three Major Cases in the Last Eleven Years Uphold Tribal Authority to Tax Nonmember Activity on Trust Lands, the Issue Involved Here.**

The sole issue raised in the Petition is an issue that has been addressed and ruled on by this Court on at least three different occasions in the last eleven years. The issue is whether Indian tribes may tax the activities of non-Indians that take place on tribal lands within the reservation. Each time the Court has addressed this issue, it has upheld the tribes' authority to tax. The present case

is governed by these prior cases, as both courts below found when they relied on them to uphold the Blackfeet Tribe's authority to tax BN.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982), this Court held that:

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. . . . [I]t derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. See, e.g., *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

That determination followed from the Court's holding two years earlier that tribes retained the authority to tax transactions occurring between Indians and non-Indians on trust land.

The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribe retains unless divested of it by federal law or necessary implication of their dependent status. Cf. *United States v. Wheeler*, 435 U.S. 313, 55 L.Ed.2d 303, 98 S.Ct. 1079 (1978).

State of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980).

Only three years after *Merrion*, this Court upheld the right of the Navajo Tribe to impose the very tax the Blackfeet Tribe seeks to impose here, a possessory interest tax. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195 (1985). The Navajo possessory interest tax is measured by the value of leasehold interests in tribal lands, and includes interests in railroad rights-of-way. In upholding the tax, the Court said:

The power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs.

Id. at 201. Recently, this Court affirmed the continuing validity of *Colville*, *Merrion* and *Kerr-McGee* in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). Thus, the power to tax nonmember activities on trust lands has been specifically upheld on three separate occasions by this Court since 1980, including, in particular, tribal authority to impose a possessory interest tax on such lands.

The decisions below specifically confirm that the property comprising BN's right-of-way is trust property.⁶

⁶ The lower court's rulings are consistent with this Court's previous construction of the 1888 Act as it applied to the Crow Tribe's title.

Whether these acts should be held to have granted a mere easement or a limited fee or some other limited interest in the land, [citations omitted]; *it is clear that it was not the purpose of Congress to extinguish the title*

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BN does not challenge that determination here. Petition for a Writ of Certiorari at 20 n.16, 21 ("Pet. at ____"). Instead, in this Court, BN attempts to establish that confusion and conflict exist in the application of the Court's precedents involving tribal taxation, but BN's thesis is not supportable.

B. No Confusion or Conflict Exists in the Area of Tribal Authority to Tax Nonmember Activity on Trust Lands.

As described above, over the last eleven years this Court's decisions in *Colville*, *Merrion*, and *Kerr-McGee* have upheld tribal authority to tax activities involving non-members on Indian lands. These cases are distinguishable from another line of cases involving tribal authority to regulate nonmember activities on *fee lands* within the reservation. *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). BN seeks to apply the fee land cases to the trust land issue in this case, but the cases themselves reject such application.

The Court's decisions in *Montana* and *Brendale* address a "narrow" regulatory issue, *Montana*, 450 U.S. at

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of the Indians in the land comprised within the right of way. To have excepted this strip from the reservation would have divided it in two; and would have rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to ensure.

United States v. Soldana, 246 U.S. 530, 532-33 (1918) (emphasis added).

557, not involved in the present case: An Indian tribe's power to regulate the activities of nonmembers when those activities occur on *fee lands*. The cases, therefore, establish a very different test from *Colville* and *Merrion*.

The test is premised on the Court's holding that neither Indian treaties nor principles of "inherent sovereignty" alone support tribal regulation on *fee lands*. *Montana*, 450 U.S. at 559, 563; *Brendale*, 492 U.S. at 422-23, 425-27. Nevertheless, the Court held that such authority may still exist.

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [Citations omitted.]

Montana, 450 U.S. at 565-66. See also *Duro v. Reina*, 110 S.Ct. 2053, 2061 (1990) ("It is true that our decisions recognize broader retained tribal powers outside the criminal context."). This is in contrast to the decisions in *Merrion* and *Colville* that "inherent sovereignty" in and of itself, and without further inquiry, supports taxation of

nonmember activities on *trust lands*. *Merrion*, 455 U.S. at 137; *Colville*, 447 U.S. at 152.

The Court's decisions have made clear the distinction between the two lines of cases. In *Montana*, the Court specifically acknowledges the distinction in upholding tribal hunting and fishing regulation on trust lands, but striking it down on fee lands.

The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe [citation omitted], and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. [Citation omitted.] What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

Montana, 450 U.S. at 557 (emphasis added). As to this latter issue, the Court concluded that neither the treaty involved nor inherent sovereignty supported tribal regulation, but set forth the test quoted above describing the circumstances when tribes may retain regulatory authority on fee lands.

The same distinction is noted by the plurality in *Brendale* in rejecting the applicability of *Colville* and confirming the application of *Montana* to the fee land regulatory issue before it:

As the opinion in *Colville* made clear, that case involved "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members." [Citation omitted.] It did

not involve the regulation of fee lands, as did Montana.

492 U.S. at 427 (emphasis added). *Brendale* involved the authority of the Yakima Tribe to zone *fee lands* within its reservation. As to these lands, the Court stated:

The inquiry thus becomes whether, and to what extent, the tribe has a protectable interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected.

Id. at 430.

Where trust lands are involved, that fact alone, establishes a protectable interest. The tribe's interest is most significant when the subject matter is the use of tribal land. In those cases, this Court has, without question, recognized the tribes' right to tax nonmembers' activities: "the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose". *Merrion*, 455 U.S. at 147. Indeed, this Court recently reaffirmed that property ownership provides a distinct foundation for tribal civil authority.

[T]his civil authority typically involves situations arising from property ownership within the reservation or "consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements." *Montana v. United States*, *supra*, 450 U.S. at 565.

Duro v. Reina, 110 U.S. at 2061 (emphasis added).⁷

⁷ The use of trust lands provides a strong tribal interest to tax BN in this case. BN has a substantial presence on the

Lower courts also have consistently recognized that an Indian tribe's "inherent sovereignty" over *trust lands* supports taxation of nonmember activities on those lands. On this issue, there is no conflict between the circuits or confusion in the application of this court's decisions. Compare *Southland Royalty Co. v. Navajo Tribe*, 715 F.2d 486 (10th Cir. 1983) (upholding application of a possessory interest and business activity tax to non-Indian holders of leases and rights-of-way over trust land) with *Burlington Northern Railroad Co. v. Blackfeet Tribe*, 924 F.2d 899 (1991) (upholding application of possessory interest tax to non-Indian holder of rights-of-way over trust land). Any *alleged* confusion over the scope of a tribe's inherent authority to tax transactions on *fee land*, see Pet. at 30, cannot be resolved by this Court within the context of this case.⁸

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Blackfeet Reservation. It operates its "main transcontinental rail line", Pet. at 3, on 58.18 miles of track across the Reservation, and maintains various buildings and other structures along its right-of-way. This main rail line crosses through the middle of the Reservation, passing through the town of Browning, the Tribal Headquarters, and through the town of East Glacier. Literally, hundreds of trains cross the Reservation on an annual basis.

⁸ Because this case deals only with taxation of BN's activities on trust lands, it has no implications for tribal taxation on fee lands. Although the Blackfeet tax applies to fee lands, the issue was not presented by the facts in this case and the Ninth Circuit did not rule on the validity of that aspect of the tax. As we have pointed out, that issue would be analyzed under the separate *Montana* and *Brendale* tests, and nothing in the decision below "foreshadows" the outcome of that analysis or sets a precedent for the fee land tax issue.

It is therefore not surprising that neither the Ninth Circuit nor the District Court discussed *Montana* or *Brendale*. Those cases address an issue which is not present in this case, i.e., the extent of tribal jurisdiction to regulate on *fee lands*.

C. A Consensual Relationship is Not Required to Tax Nonmember Activity on Trust Lands.

BN attempts to blur the clear distinction between the two lines of cases in order to set up a false conflict. It argues that the Court's case require a consensual relationship in order for the Blackfeet Tribe to tax BN's activities even on trust lands within the Blackfeet Reservation. The Court's cases, however, do not support application of this requirement to trust lands. To the contrary, the Court has made clear that because tribes possess *inherent sovereignty* to tax non-Indian activities on trust lands, the issue of consent has no relevance.⁹

Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority.

Merrion, 455 U.S. at 147.

Even if the Tribe's power to tax BN was dependent upon a consensual relationship, Article VIII of the 1888

⁹ Even though consent has no relevance to the exercise of the Tribe's sovereign authority over trust lands, we can think of no instance in which a nonmember could use trust land without the Tribe's or an individual Indian's consent.

Act created such a relationship. In Article VIII, the Black-foot Tribe "agreed" that a right-of-way "shall be, and is hereby, granted" for railroad purposes, among others. Clearly, the Tribe consented to BN's predecessor's right-of-way grant.¹⁰ Moreover, pertinent legislative history makes clear that the Tribe's consent to the railroad right-of-way was required. Bills introduced in the House and Senate in 1886 authorized railroad companies to obtain a right-of-way across the 1874 Act Reservation. See S.2281 introduced April 29, 1886, and H.R.8741 introduced May 10, 1886 (both 49th Cong. 1st Sess.). The bills passed both the House and the Senate, but were vetoed by President Cleveland for the specific reason that the Indians had not given their consent.

The bill is in the nature of a general right of way for railroads through this Indian reservation. ~~The~~ Indian occupants have not given their consent to it, neither have they been consulted regarding it, nor is there any provision in it for securing their consent or agreement to the location or construction of railroads upon their lands.

S.Rep. No. 1494, 49th Cong. 1st Sess. 6.

¹⁰ The Ninth Circuit also found consent to exist:

If a consensual relationship was necessary, the Tribe consented to railroad rights-of-way by joining Article VIII of the agreement ratified by the Act of 1888 and Burlington Northern chose to run rail lines through the Reservation by voluntarily applying for rights-of-way.

Burlington Northern, 924 F.2d at 904 n. 7.

The President further stated that he saw no "public exigencies" which required the legislation "which would affect so seriously the rights and interests of the Indians occupying the reservation." *Id.* The President also found that the legislation:

Ignores the right of the Indians to be consulted as to the disposition of their land . . . ; it gives the right to enter upon Indian lands to a class of corporations carrying with them many individuals not known for any scrupulous regard for the interest or welfare of the Indians.

Id. at 7. Congress did not override the President's veto.

Ultimately, the Blackfeet Tribe authorized railroad rights-of-way across the diminished Blackfeet Reservation in the 1887 agreement as ratified by the 1888 Act.¹¹ From the prior Congressional attempt in 1886 to authorize railroad rights-of-way across Blackfeet lands without tribal consent, it is clear that the 1888 Act railroad right-of-way provision was a measure meant to fully respect and fully protect the property rights and other rights of the Tribe, and specifically, the need to obtain tribal consent.¹²

¹¹ BN argues that the Tribe no longer has the power to exclude BN and, therefore, lacks the authority to tax. Pet. at 16 n.21, 20 n.16. In its agreement with the United States, the Tribe granted use of its lands for specific rights-of-way purposes, including railroads. Once BN ceases to use the right-of-way for the specific purpose granted, the Tribe no longer has an obligation to allow the use of trust land and can exercise its power to exclude. See *Merrion*, 455 U.S. at 144.

¹² BN apparently believes that the fact neither it nor its predecessor in interest negotiated directly with the Tribe somehow destroys the consensual nature of the Tribe's grant to the

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II. Neither the Ninth Circuit's Decision Nor the Court's Precedents Authorize Unrestricted or Discriminatory Taxes.

A. The Tribe's Taxing Authority is Subject to Federal Restrictions.

The tribal taxes involved in this case are not novel or unique. The State of Montana has been imposing similar taxes for years. *See* MONT. CODE ANN. §§ 15-23-201-202; §§ 15-23-301-303; 15-6-141(1)(iv); 15-6-145 (1991). *See also* Pet. 27. Other jurisdictions routinely impose such taxes. The Tribe's authority to impose such taxes is not unfettered or unchecked, however.

The Tribe's authority to tax is derived from its Constitution, which was approved by the Secretary of the Interior in 1935 under authority of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. §476. Article IV, section (1)(h) of the Blackfeet Constitution provides that the Tribal Council is empowered "to levy assessments for public purposes, provided that any assessments upon nonmembers trading or residing within the jurisdiction of the Tribe shall be subject to the approval of the Secretary of the Interior." Accordingly, the tax ordinance involved here was submitted for approval to the Area Director for the Billings Area Office of the Bureau of Indian Affairs, the Secretary's delegate, and the ordinance was approved on April 8, 1987.

Congress has mandated federal approval of the Tribe's Constitution, and the Blackfeet Constitution

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United States. *See* Pet. at 19-20. BN blithely ignores the fact that it is a third-party beneficiary of the agreement between the Tribe and the United States.

mandates federal approval of any taxes applied to nonmembers. Thus, unlike the situation of state taxation, both the Tribe's authority to tax nonmembers and the specific tax being challenged has been approved by the Federal Government.

This Court has noted the "series of federal checkpoints" established by Congress in reviewing tribal taxes.

Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal Government can take away this power, and the Tribe must obtain approval of the Secretary before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax *will be consistent with national policies*.

Merrion, 455 U.S. at 141 (emphasis added).¹³ Therefore, before the Blackfeet Tribe could even begin to tax, both its Constitution and its tax were approved by the Federal Government. Even more than the interstate commerce clause, the federal approvals protect BN against any potential discriminatory tribal taxes. And, while the Tribe may not be constrained by the Fourteenth Amendment of the Constitution, it is constrained by the 1968 Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. §1302, which, like the Fourteenth Amendment, provides due process and equal protection guarantees to "any person".

¹³ Federal approval is not always required, however, in order for a tribal tax to be valid. *Kerr-McGee v. Navajo Tribe*, 471 U.S. 195 (1985).

BN took advantage of both the tribal and federal approval process. It appeared at a public meeting on the tax and submitted oral and written comments. It also appeared at a public meeting sponsored by the Bureau of Indian Affairs, held prior to the Bureau's approval of the tax.

The same federal checkpoints also insure that there is no conflict with any national policies involving railroads and other matters. Where there is a conflict with national policy, such as that alleged by BN, Pet. at 25-30, the appropriate forum to address that conflict is in Congress. Congress clearly has the authority to "alter the current scheme under which the tribes may impose taxes" *Mer- rion*, 455 U.S. at 156, if it concludes that such tax schemes conflict with overriding national efforts to revitalize the nation's railroads.

Moreover, BN has the same opportunity to lobby and influence the Blackfeet Tribal Council, the governing body of the Tribe, as it does any state legislature. Although BN does not vote in tribal elections any more than it votes in state elections, and even though it is in the same "captive" position as it is in the states through which it crosses, we have no doubt that BN has the ability to impact the tribal taxing process, just as it impacts the state taxing process.¹⁴

¹⁴ BN's ability to impact the tribal process has already been demonstrated. When BN appeared at the public hearings held on the Blackfeet tax, BN's comments specifically resulted in an amendment to the ordinance providing for an alternate independent appraisal method of valuation. BN also notes in its

(Continued on following page)

B. The Use of Tax Revenues is Restricted to Providing Services.

The Tribe's ordinance requires that tax revenues be used only "to defray the costs of providing governmental services on the Reservation". App. at 13. Thus, the revenues are dedicated only for the purpose of providing the "civilized society" and other services made available by the Tribe. BN benefits from the "civilized society" provided by tribal government, see *Cotton Petroleum v. New Mexico*, 490 U.S. at 189; *Commonwealth Edison v. Montana*, 453 U.S. 609, 614-629 (1981), and also has available to it numerous public services. Many of these services have been utilized when accidents, fires and other problems relating to BN's presence have occurred. Indeed, accidents regularly occur on the 58 miles of track running through the Reservation and the Tribe has been required to respond to these occurrences.

In short, BN is fully protected by federal and tribal law from discriminatory application of tribal taxes. Its claim of potential discrimination raises no issue which the Court should review.

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Petition at 6 n.4, that its tax liability under the Blackfeet and Fort Peck taxes was cut almost in half for the 1987 tax year and subsequent tax years. The reduction in taxes came about as a result of a reduction in Montana's valuation, which was accomplished through a negotiated agreement with the State. The Blackfeet Tribe subsequently agreed to the same reduction. BN then approached the Tribe to negotiate a Reservation property valuation separate and apart from the State's valuation method, and discussions were commenced for this purpose.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

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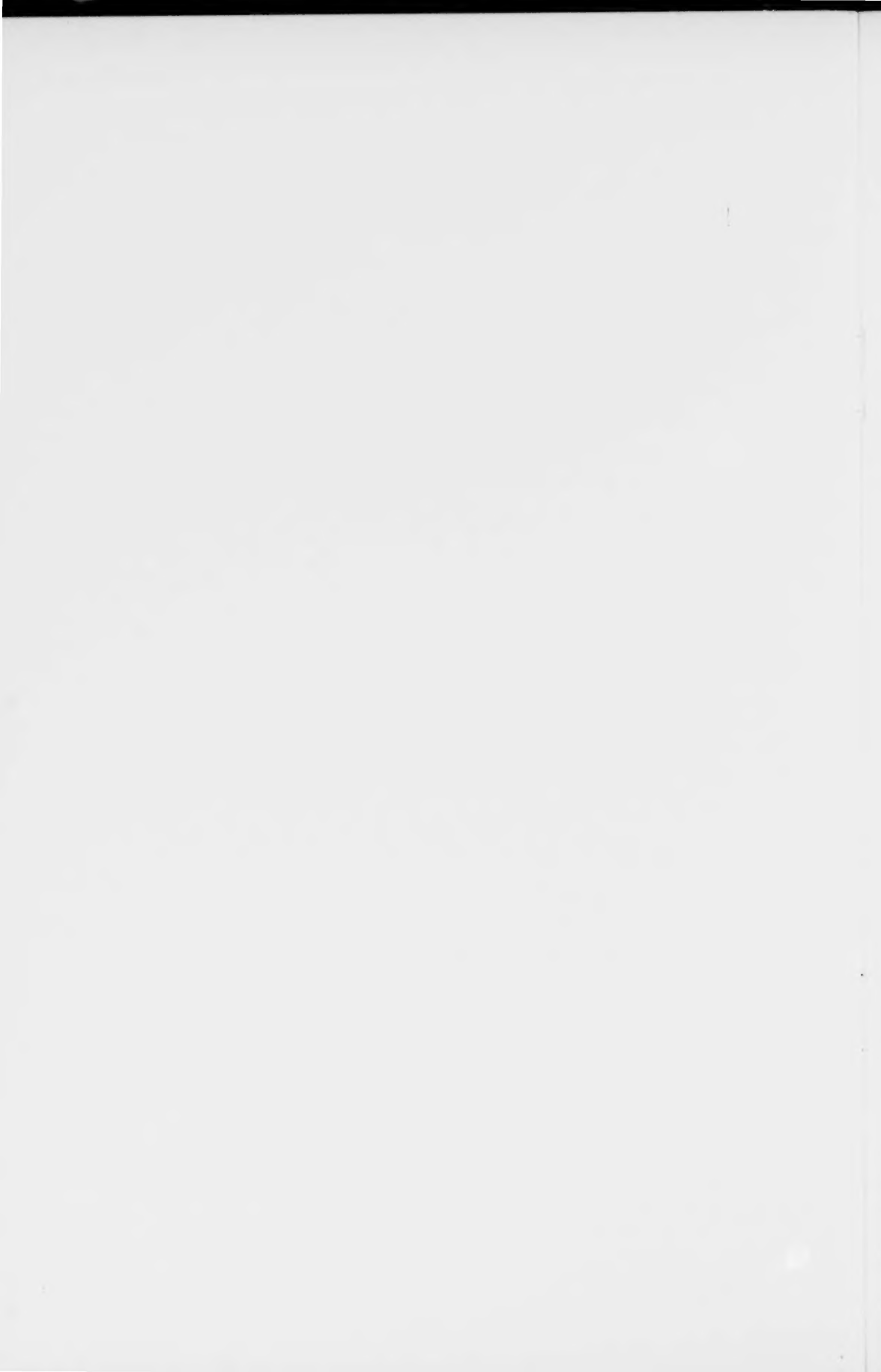
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November 4, 1991



APPENDIX A



App. 1

**THE BLACKFEET TRIBE
OF THE BLACKFEET INDIAN NATION
BLACKFEET TRIBAL ORDINANCE
PROVIDING FOR A
POSSESSORY INTEREST TAX**

NUMBER: 80

As Amended

By Resolution No. 213-87

Section 1. STATEMENT OF PURPOSE.

It is the policy of the Blackfeet Tribe to provide members and non-members of the Tribe residing, doing business or working within the Blackfeet Reservation with essential governmental services. To finance this governmental policy, the Blackfeet Tribe in this Ordinance adopts a possessory interest tax which will provide the Tribe with revenues necessary to fund essential governmental services within the Reservation boundaries which will benefit all individuals and businesses on the Reservation.

Section 2. TAX ADMINISTRATION DIVISION.

A Tax Administration Division of the Blackfeet Tribe is hereby established to administer this Ordinance and to keep all records and accounts concerning this tax. The Blackfeet Tribal Business Council shall from time to time designate an individual to be Director of said Tax Administration Division. Any inquiries concerning said tax shall be made through the Tax Administration Division of the Tribe.

App. 2

Section 3. DEFINITIONS.

Unless the context otherwise requires in this Ordinance, the following definitions shall apply:

(a) Tribe.

"Tribe" shall mean the Blackfeet Tribe of the Blackfeet Indian Reservation.

(b) Blackfeet Indian Reservation or Reservation.

"Blackfeet Indian Reservation" or "Reservation" shall mean all lands subject to the jurisdiction of the Blackfeet Tribe and includes any and all lands within the exterior boundaries of the Blackfeet Reservation, regardless of whether they are owned in fee, whether they be allotted or Tribal lands, or whether they be otherwise held.

(c) Chairman.

"Chairman" shall mean the Tribal Chairman of the Blackfeet Tribe.

(d) Superintendent.

"Superintendent" shall mean the Superintendent of the Blackfeet Agency, Bureau of Indian Affairs.

(e) Tribal Court

"Tribal Court" shall mean the Blackfeet Tribal Court as described in the Blackfeet Law and Order Code and does not include the Court of Appeals of the Blackfeet Tribe.

App. 3

(f) Court of Appeals.

"Court of Appeals" shall mean the Blackfeet Court of Appeals as described in the Blackfeet Law and Order Code.

(g) Taxable Person.

"Taxable Person" shall mean any person or entity, including any individual, partnership, corporation or other legal entity, having ownership rights in any possessory interest within the Blackfeet Indian Reservation.

(h) Possessory Interest.

"Possessory Interest" shall mean any non-exempt interest in real property within the exterior boundaries of the Blackfeet Indian Reservation, including the value of any property or improvements thereon. Examples of such interest include: (1) those held in fee (2) those held under lease (3) those held under permit (4) those held under an easement or right-of-way.

(i) Market Value.

"Market Value" is the value at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

(j) Commercial Business.

"Commercial Business" shall mean any person or entity organized primarily for the purpose of operating a retail sales or service business on the Reservation. Commercial Business as defined herein does not include a utility.

App. 4

(k) Utility.

"Utility" shall mean any privately or publicly held entity engaged in supplying, transmitting or distributing electricity, gas, water, telephone, telegraph or other communication services, or transportation services.

Section 4. RATE OF TAX.

The possessory interest tax set forth herein shall be assessed at the rate of four percent (4%) of the market value of the possessory interest as determined and computed in accordance with this Ordinance. Said rate of tax shall be and remain the same as herein established unless modified by an ordinance of the Blackfeet Tribal Business Council.

Section 5. COMPUTATION OF VALUE OF POSSESSORY INTEREST.

The value of a possessory interest shall be computed as provided in this section or by any other method adopted by the Tax Administration Division of the Tribe which accurately reflects the fair market value of the possessory interest which is subject to taxation.

(a) Date of Valuation.

All property that is subject to valuation under this Ordinance for all or any part of any tax year shall be valued as of October 1st of each year. Tax assessments for the following year shall be made based upon this value.

App. 5

(b) Method of Valuation.

The value of a possessory interest, including all property and improvements thereon, shall be 100% of market value, as that market value is stated on the assessment books of the county assessor for the county or counties in which the property is located, as apportioned to the Reservation, said apportionment being made on a mileage basis or on a per unit basis.

(c) Independent Appraisal Option.

As an alternative to accepting the market value of any possessory interest subject to the tax as being that market value stated in the assessment book of the county assessor for the county or counties in which the property is located, as apportioned to the Reservation, the Tax Administration Division may have the particular possessory interest assessed by a qualified independent appraiser when both the Tax Administration Division and the taxpayer holding the possessory interest agree in writing:

- (1) on a particular independent appraiser to do the appraisal;
- (2) that the taxpayer shall bear the costs of the independent appraisal;
- (3) to accept the results of the independent appraisal;
- (4) that the independent appraisal shall be completed by November 1st of the year preceding the tax year.

App. 6

Section 6. REPORTING REQUIREMENTS.

Each owner of a possessory interest shall comply with the following reporting requirements and such other requirements as are by rule or regulation adopted by the Tax Administration Division of the Tribe:

(a) Forms.

The Tax Administration Division shall provide forms for the reporting of all possessory interests to the Tribe for determination and assessment of tax due.

(b) Reporting Date.

Each taxpayer shall report the value of its possessory interests by November 15th of each year. Notice of tax assessment and tax due shall be mailed by the Tax administration Division by December 1st of each year, which tax shall be paid within thirty (30) days of the date of said notice, unless another date is specified by the Tax Administration Division. Taxes shall be due in advance based on the assessed valuation. Reporting dates for the 1987 Tax year only shall constitute exemptions to these usual reporting dates as follows: valuation information for the 1987 tax year shall be reported by taxpayers to the Tax Administration Division by May 1, 1987; notice of taxes assessed for 1987 shall be mailed to taxpayers by May 15, 1987; taxes for 1987 shall be due within 30 days of said notice.

(c) Extension of Time.

Upon timely written request to the Tax Administration Division, a taxpayer may request an extension of time within which to report the value of its possessory

App. 7

interests; and for good cause shown, the Tax Administration Division may extend, for a period not to exceed thirty (30) days, the valuation reporting due date, but no further extension shall be allowed. Such a request for extension, to be timely, must be received by the Tax Administration Division prior to the valuation reporting due date. Requests for extension received by the Tax Administration Division after the valuation reporting due date shall not be considered.

(d) Administrative Reports.

The Tax Administration Division shall report all activities and collections to the Blackfeet Tribal Business Council at least annually.

Section 7. EFFECTIVE DATE.

The effective date of this tax ordinance shall be January 1, 1987, with the initial full tax year being January 1, 1987 through December 31, 1987.

Section 8. PAYMENT OF TAXES DUE.

Any taxes assessed shall be paid to the Treasurer of the Blackfeet Tribe with reports being filed with the Tax Administration Division, as set forth herein. Payment will be considered to have been timely made if it is post-marked before midnight on the date on which the tax is due or if it is delivered to the Office of the Treasurer of the Blackfeet Tribe by certified mail or in person and a receipt is given before the due date.

App. 8

Section 9. TAX DECLARATION.

Every nonexempt taxable entity or person within the Reservation boundaries shall designate a natural person as the individual empowered by the taxable entity to serve on behalf of the taxable entity with respect to all matters involving this tax. Said designated natural person shall complete the forms distributed by the Tax Administration Division and provide the information required herein.

Section 10. PENALTY FOR LATE PAYMENT.

Any taxable entity or person failing to pay the amount of tax assessed by the due date shall pay a penalty on the outstanding balance in the amount of two percent (2%) per month of delay in making payment, pro rated to the actual date of receipt by the Tax Administration Division.

Section 11. EXEMPTIONS.

1. No possessory intent which consists of a service line of a utility which exclusively serves the Blackfeet Indian Reservation or of a delivery or distribution facility of a utility which exclusively serves the Blackfeet Indian Reservation shall be subject to this tax. Utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall be subject to this tax.

2. No possessory interest held by the United States, by the Blackfeet Tribe, by the State of Montana, or by

App. 9

counties, cities, towns or school districts within the State of Montana shall be subject to this tax.

3. No possessory interest in property which is used as a homesite, farm, or ranch whether held by or through an allotment or lease thereof, a Blackfeet tribal land assignment or lease, held in fee, or otherwise held, shall be subject to this tax.

Section 12. METHOD OF CLAIMING EXEMPTION.

A claim for exemption from taxation pursuant to Section 11 of this Ordinance shall be made at the time of the filing of valuation reporting information with the Tax Administration Division and shall be accompanied by a map clearly indicating the specific property for which exemption is claimed.

Section 13. APPEAL PROCEDURES FOR PROTESTED TAXES.

Any taxpayer may pay its tax under protest and request a refund of all or part thereof by filing a Notice of Protest with the Tax Administration Division of the Blackfeet Tribe at the time of payment. No refund shall be ordered except upon a protest filed within six months after the date when the protested tax would have become delinquent if the same had not been paid. All such protests shall be handled as follows:

(a) Any protest received shall be referred to a three-member Tax Protest Panel to be appointed by the Blackfeet Tribal Business Council from without the membership of the Blackfeet Tribal Business Council. The Tax

Protest Panel shall make a determination as to whether or not the protested tax shall be refunded and shall report its decision in writing to the protesting party, the Blackfeet Tribal Business Council, the Tribal Treasurer and the Director of the Tax Administration Division of the Tribe within five (5) working days of the date of determination of said protest. The Tax Protest Panel may seek any additional information or hold such hearings or meetings as it determines are necessary in such a manner (either formal or informal) as it determines is necessary. Additionally, said Tax Protest Panel may issue rules and regulations for the conduct of panel meetings and tax protest hearings. The decision of the Tax Protest Panel shall be final unless appealed to the Tribal Court in accordance with the provisions of this Ordinance.

(b) Appeal from a determination of the Tax Protest Panel may be made to the Tribal Court by filing a Notice of Appeal with the Clerk of the Tribal Court with copies to the Blackfeet Tribal Business Council, to the Director of the Tax Administration Division and to the Chairman of the Tax Protest Panel within fifteen (15) days of the date of the decision of the Tax Protest Panel. Upon receipt of an appeal from the Tax Protest Panel, the Court Clerk shall schedule a hearing before the Tribal Court at which time the protesting taxpayer shall be allowed to state the basis for the protest and be represented by counsel, at his own expense. The decision of the Tribal Court regarding the protest shall be made in writing and distributed to the protesting taxpayer or his counsel, the Director of the Tax Administration Division, the Tribal Treasurer, the Blackfeet Tribal Business Council and the Chairman of the Tax Protest Panel within five (5) working days of the date of

the decision. The decision of the Tribal Court shall be final unless appealed to the Court of Appeals as provided for herein.

(c) Appeals from the determination of the Tribal Court may be made to the Court of Appeals by filing a Notice of Appeal with the Clerk of the Tribal Court, with copies to the Blackfeet Tribal Business Council, the Treasurer of the Tribe, the Director of the Tax Administration Division and the Chairman of the Tax Protest Panel within fifteen days of the date of the decision of the Tribal Court. Upon the docketing of an appeal from the Tribal Court, an appellate briefing schedule and a time for oral argument shall be established pursuant to the appeals procedures established by the Blackfeet law and Order Code. The written decision of the Court of Appeals shall be distributed to the protesting taxpayer or his counsel, the Director of the Tax Administration Division, the Chairman of the Tax Protest Panel, the Treasurer of the Tribe, and the Blackfeet Tribal Business Council within five (5) working days of the date of decision. The decision of the Court of Appeals shall be final.

(d) No protest shall be heard unless the assessed taxes have first been paid by the taxpayer to the Treasurer of the Tribe within six months after the date when the taxes would have become delinquent. The Treasurer shall hold any contested amounts without expenditure in an interest bearing account, if possible, until a determination is made on the protest filed.

(e) If any tax is found to be erroneously or illegally collected, interest at the rate of four percent (4%) per

App. 12

annum shall be allowed on the amount erroneously or illegally collected.

(f) The taxpayer has the burden of proof to establish that the protested tax was erroneously or illegally collected.

Section 14. EXTENSION OF TIME FOR PAYING TAX.

Upon the filing with the Tax Administration Division of a timely request for an extension of time within which to pay assessed taxes, and upon a showing of good cause, the Tax Administration Division may extend, for a period not to exceed sixty (60) days, the due date for taxes assessed, but no further extension shall be allowed. Such a request for extension, to be timely, must be filed on or before the date the assessed taxes are due. The penalty for late payment as provided for in Section 10 of this Ordinance shall apply to any payment for which an extension has been granted as well as other late payments.

Section 15. COLLECTION POWERS.

The Tax Administration Division, in the name of the Tribe, shall have full power to collect taxes and penalties assessed, including the power to file suit in Tribal Court or in any other court of competent jurisdiction, and to execute on any judgment by all appropriate legal remedies including attachment and seizure of the assets of any taxpayer.

App. 13

Section 16. NO WAIVER OF SOVEREIGN IMMUNITY.

The Blackfeet Tribe does not in any way waive its sovereign immunity from suit to contest the validity of this Ordinance. The determination to refund all or part of a protested tax payment shall be made in accordance with the terms of this Ordinance. Any decision of the Tribal Court or the Court of Appeals on a protested tax payment or protested assessment made in accordance with Section 13 hereof shall be final.

Section 17. SEVERABILITY.

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

Section 18. USE OF TAX PROCEEDS.

All monies received shall be deposited by the Treasurer of the Tribe in the general fund to be budgeted by the Blackfeet Tribal Business Council and expended to defray the costs of providing governmental services on the Reservation. The Treasurer of the Tribe may execute vouchers against this fund to make refund adjustments, payments of interest or payments for any purpose for which this Ordinance may require. The Treasurer shall refund any taxes paid on which protests have been allowed, with interest as allowed by the Ordinance within thirty (30) days of the date of final decision.

App. 14

Section 19. AMENDMENT.

This Ordinance may be amended by a majority vote of the Blackfeet Tribal Business Council. The Tax Administration Division shall notify taxpayers of any amendment.

BLACKFEET TRIBE OF
THE BLACKFEET INDIAN
RESERVATION

/s/ Archie St. Goddard, Acting
Earl Old Person, Chairman

ATTEST:

/s/ Marvin D. Weatherwax
Secretary

CERTIFICATION

I hereby certify that the foregoing Ordinance was adopted by the Blackfeet Tribal Business council in a duly called, noticed and convened Special session assembled for business on the 3rd day of March, 1987, with Six members present to constitute a quorum and by vote of Five members for and -0- members opposed, with one (1) member abstaining.

/s/ Marvin D. Weatherwax
Secretary Blackfeet
Tribal Business Council
